Supreme Court, U. S.
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APPENDIX

In The
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-677

REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, and ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 25, 1979

CERTIORARI GRANTED JANUARY 14, 1980

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIVIL ACTION NO. 78-5060

Date	NR.	Proceedings
July 19, 1978	2	Complaint Filed.
July 19, 1978	3	Motion for Temporary Restraining Order and Preliminary Injunction filed.
July 19, 1978	4	Affidavit in Support of Motion Filed—David Harrald.
July 19, 1978	5	Affidavit of C. A. Reeves filed.
July 19, 1978		Hearing on Temporary Restraining Order before the Honorable Andrew W. Bogue, Judge Presiding—Ruling Reserved.
July 21, 1978	10	Order granting Temporary Restraining Order and Preliminary Injunction filed.
August 1, 1978	12	Notice of Appeal filed.
August 1, 1978	15	Application for Stay Pending Appeal filed.
August 1, 1978	16	Affidavit in Support of Stay Pending Appeal filed.
August 2, 1978	17	Order denying Application for Stay Pending Appeal filed.
August 17, 1978	19	Motion and Answer filed.

August 23, 1978	21	Appeal from the United States District Court from the District of South Dakota filed.
November 16, 1978	22	Order that Injunction is vacated and Complaint is dismissed filed.
December 5, 1978	23	Mandate from the Eighth Circuit Court of Appeals remanding this action to District Court filed.
December 5, 1978	24	Opinion of the Eighth Circuit Court of Appeals filed.
June 18, 1979	27	Order of the Eighth Circuit Court of Appeals for this Court to return Mandate filed.
June 18, 1979	28	Order of the Supreme Court of the U. S. that judgment of the U. S. Court of Appeals is vacated with costs and cause is remanded to same filed.
June 19, 1979	29	Order of U. S. District Court vacating dismissal order of November 16, 1978 and reinstating injunctive order of July 21, 1978.
September 6, 1979	30	Opinion of the United States Court of Appeals for the Eighth Circuit filed.
September 6, 1979	31	Mandate of the United States Court of Appeals for the Eighth Circuit remanding this action to the United States District Court filed.

RELEVANT PLEADINGS, FINDINGS and OPINIONS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIVIL ACTION NO. 78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

COMPLAINT

COME NOW the plaintiff, and for its Complaint against the defendants, states and alleges as follows:

I.

JURISDICTION

This is a suit for injunctive relief against the members of the South Dakota Cement Commission who have, under color of state law, taken certain action which impedes the flow of interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, which confers upon Congress the power "to regulate Commerce . . . among the several States" and which deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Jurisdiction of this Court is invoked under 28 U. S. C. 1331 and 28 U. S. C. 1443.

II.

PLAINTIFF

(a) Plaintiff is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Plaintiff is engaged in the business of the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson, and Campbell Counties Wyoming. Plaintiff supplies approximately 54% of the consumers who purchase concrete within its market area. Plaintiff receives 100% of its cement, a necessary ingredient in the production of concrete from outside the State of Wyoming.

(b) For the last twenty (20) years, since its inception in 1958, plaintiff has received 95% of its cement from the South Dakota Cement Commission in Rapid City, South Dakota. During the calendar year of 1977, plaintiff purchased approximately $1,172,000 worth of cement from the South Dakota Cement Commission at its plant in Rapid City, South Dakota. During the first six months of 1978, plaintiff received approximately 25% of its cement needs from Ideal Cement Company in Billings, Montana.

(c) Upon delivery to plaintiff's concrete plants in Wyoming, the cement is mixed with other ingredients for concrete. The concrete and concrete products are exclusively produced for sale through permanent outlets in Buffalo, Gillette, and Sheridan, Wyoming. Reeves, Inc. does sell approximately 5% of its concrete or concrete

products outside of the State of Wyoming. Stockpiles of cement held by Reeves, Inc. are exhausted and the production of concrete by plaintiff has been reduced to 25% of estimated production capacity.

(d) Since January 1, 1975, plaintiff has purchased from the South Dakota Cement Plant the following dollar volumes:

1975	$ 871,000
1976	824,000
1977	1,172,000
1978 to June 30, 1978	235,000

(e) Plaintiff has made an investment of about $3,000,000 over the last twenty (20) years in plant equipment, supplies, facilities and material sources, in reliance upon its expectation of having a continuing source of supply of cement from the South Dakota Cement Plant.

III.

DEFENDANTS

(a) Defendants are members of the South Dakota Cement Commission, appointed pursuant to SDCL 5-17-2 to administer and control the South Dakota Cement Plant at Rapid City, South Dakota. Constitutional Authorization for the operation of said plant is conferred by Article XIII, Section 10 of the Constitution of South Dakota. The South Dakota Cement Commission is an "agency" as defined in SDCL 1-26-1 (1).

IV.

(a) The South Dakota Cement Plant is engaged in interstate commerce. Coal and other materials essential to

its operations are procured through the channels of interstate commerce. Cement produced by the plant is sold in interstate commerce.

(b) Plaintiff is engaged in interstate commerce. There are no facilities within Wyoming producing cement, except a plant at Laramie, serving the southern portion of the state. Plaintiff's entire business operation consists of procuring cement through the channels of interstate commerce and furnishing concrete to purchasers in Wyoming. All users of cement products in northern Wyoming are dependent upon the channels of interstate commerce for their needs.

(c) By Regulation 15:01:05:01 1974 ARSD, sales representatives of the cement plant are authorized to travel in the States of North Dakota, Minnesota, Nebraska, Iowa, Wyoming, Montana, and Colorado to solicit customers for the plant, which states are defined as the marketing area for the plant.

(d) Under Regulation 15:01:08:01 1974 ARSD, plaintiff is a "qualified buyer".

V.

On June 1, 1978, the defendants, acting under color of state law, took the following action:

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments with the remaining volume allocated on a first come, first serve basis."

VI.

The "contract commitments" referred to above, together with demands of South Dakota customers presently

consume the entire production of the South Dakota Cement Plant, thereby cutting off this plaintiff from its accustomed source of supply of cement, crippling its business, and inflicting irreparable damage upon it.

VII.

On July 5, 1978, the plaintiff dispatched a cement truck to the South Dakota Cement Plant in Rapid City, South Dakota, and requested that the truck be loaded with cement, at which time the driver of the plaintiff's truck was informed that the truck could not be loaded for the reason that plaintiff is located and does business outside the State of South Dakota. Under the action of the defendants and under color of state law, plaintiff is denied the opportunity to purchase cement from the South Dakota Cement Plant, whereas a resident of the State of South Dakota conducting the same type of business is allowed to purchase cement.

VIII.

In reliance upon a close business relationship between the plaintiff and the South Dakota Cement Plant in Rapid City, South Dakota developed over the last twenty (20) years, plaintiff has dealt almost exclusively with the South Dakota Cement Commission for its source of cement without the requirement by either party of a written contract. The defendants have encouraged and sanctioned the sale of cement to the plaintiff to the extent that plaintiff has relied almost entirely on its supply of cement from the South Dakota Cement Plant for the operation of its business. As a result, plaintiff is unable, after diligent efforts, to locate

any other feasible source of the supply of cement needed for its continued operation.

IX.

CAUSES OF ACTION

FIRST COUNT

(a) The plaintiff's activities described in paragraph II, by which the plaintiff purchases cement from the defendant at its plant in Rapid City, South Dakota, necessary for its business, constitute interstate commerce. The action of the defendants imposes an undue burden on, and discriminates against, interstate commerce by discriminating between the plaintiff and residents of South Dakota, based solely on residence, all in violation of the Commerce Clause of the United States Constitution.

(b) There is no reasonable basis for the arbitrary and capricious restriction sought to be imposed on plaintiff who regularly maintains a business outside the state of South Dakota.

SECOND COUNT

(a) The "Policy" reaffirmed by the members of the South Dakota Cement Commission on June 1, 1978, described in paragraph IV above, a copy of which is attached hereto, is a rule as defined under SDCL 1-26-1 (7).

(b) Said Policy was adopted and reaffirmed in violation of SDCL 1-26-4 requiring a notice and hearing of the proposed rule-making.

(c) No general notice of proposed rule-making was published in accordance with state law and plaintiff has

been denied the opportunity to participate in the rule-making through submission of written data, views or argument.

(d) The action of the defendants is invalid as to the plaintiff in that the action is arbitrary and capricious on its face and in effect deprives the plaintiff of the privilege of doing business without due process of law.

X.

IRREPARABLE HARM

(a) In view of the action of defendants and in view of the fact that there is a shortage of a supply of cement and no other sources for supply are presently available, plaintiff will be prohibited from doing business and will thereby suffer irreparable loss and damage in excess of the sum of $10,000, exclusive of interest and cost.

(b) Plaintiff has no adequate remedy in law and for that reason it is impossible to estimate with any degree of accuracy the amount of damage that will be incurred by the plaintiff by reason of the threatened deprivation of its business for the reasons given above.

(c) Plaintiff's continued existence depends on the revenue received by it for the sale of concrete. In the event cement is unavailable from South Dakota Cement Commission, plaintiff will suffer great irreparable damage due to the loss of its sale of concrete. The result in loss of revenue caused by the loss of concrete will materially and drastically affect its ability to continue to serve the public.

WHEREFORE, plaintiff prays:

1. That this Court will make an Order restraining and enjoining defendant from enforcing the terms of the directive of June 1, 1978, against agents, representatives, and employees of plaintiff until final hearing and termination of this cause or until further Order of this Court.

2. That after hearing thereon the Court adjudge the directive to be unconstitutional and therefore unenforceable.

3. That this Court make permanent the restraining order and injunction against enforcement of the directive of June 1, 1978.

4. That defendants be directed to allocate to this plaintiff a pro-rata portion of current production based on plaintiff's purchases during the year of 1977.

5. For such other and further relief as the Court may deem proper.

DATED this 19 day of July, 1978.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

By: /s/ Geo. A. Bangs
Attorneys for Plaintiff

818 St. Joe Street; P. O. Box 2670
Rapid City, SD 57709

KIRVEN & KIRVEN

By: /s/ Dennis M. Kirven

104 Fort Street
Buffalo, WY 82834

(Verification and jurat omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ATTACHMENT TO COMPLAINT

MINUTES

SOUTH DAKOTA CEMENT PLANT

JUNE 1, 1978

A regular meeting of the members of the South Dakota Cement Commission was held at Pierre, South Dakota, June 1, 1978 with the following Commission members being present: Tom Kelley, Chairman; Stan Frank, Vice Chairman; John E. Phelps, Secretary-treasurer, Al Sandvig and Dave Johnson.

Also present were William P. Scanlon, President and General Manager; Joseph J. Ziegler, Vice President of Administration, and Mr. Fred Winkler for Plant Counsel, Donald R. Schultz.

The minutes of the regular meeting of May 18, 1978 were read and approved as written. The Commissioners' per diem allowance for the month of May were reviewed for payment.

The disbursement record and the status of funds invested by the State Investment Officer for the month of May were reviewed and upon motion duly made, seconded and unanimously carried, the Commission approved the same as presented.

The amount of funds necessary to transact business at the Plant for the next thirty-one day (31) period was reviewed and upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA
CEMENT COMMISSION

Pursuant to the provisions of Chapter 5-17 of SDCL (1967) IT IS HEREBY RESOLVED: By the South Dakota Cement Commission that its Secretary-treasurer be, and he is authorized and instructed to make a requisition and file the same with the State Auditor for a sum not to exceed Two Million and no/100 Dollars ($2,000,000.00) which is the estimated amount necessary for the transaction of business for the thirty-one day period beginning July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 2 of 3

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA
CEMENT COMMISSION

WHEREAS, The provisions of South Dakota Compiled Laws (SDCL) 5-17-2 requires the Commission to annually choose from its membership a chairman, vice-chairman and secretary-treasurer; therefore

BE IT RESOLVED That the South Dakota Cement Commission has unanimously nominated and elected Mr. Tom Kelley as chairman, Mr. Stan Frank as vice-chairman and Mr. John E. Phelps as secretary-treasurer; and

BE IT FURTHER RESOLVED That said appointments be effective for the ensuing fiscal year commencing July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 3 of 3

Attorney Fred Winkler reviewed with the Commission the notice of hearing to pass, amend and repeal the Plant's retirement rules pursuant to the provisions of SDCL 1-21 and SDCL 5-17-5. Because of the statutory timetables to be adhered to and the requirements of the fiscal note, the Commission authorized management to publish the notice of hearing as soon as practical in accordance with the statutory provisions.

President Scanlon reported to the Commission on the matter of the serious cement shortage being experienced at the plant and throughout the country. This shortage is due to a dramatic increase in cement usage in the regular marketing area, the shortage of supply by all neighboring cement manufacturers and nationally, and the plant's inability to place number six kiln on line as originally planned. Mr. Scanlon also stated that various attempts have been made to procure cement from other cement plants without success. The Commission discussed the Plant's major contract commitments requiring approximately 218,000 tons of cement for 1978 for paving projects only. After discussing all these matters at considerable length, the Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis. The Commission also instructed management to continue its efforts in procuring additional cement to aid in meeting current demands. Because of the serious cement shortage, President Scanlon

was requested to stay in close communication with the Commission on all matters of significant nature.

Chairman Kelley reported to the Commission that the Chicago North Western Railroad line between Rapid City and Pierre is currently slated for extensive repair and replacement.

President Scanlon reported to the Commission on the following items: Plant equipment acquisitions and the status of Plant fuel and power contracts.

The Commission then discussed the annual plant picnic and tentatively set the date for July 16, 1978 with an alternative date of July 23 in the event of inclement weather.

There being no further business to conduct, upon motion duly made, seconded and unanimously carried, the meeting was adjourned until the next regular meeting tentatively scheduled to be held in Rapid City, South Dakota on July 11, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

(Caption omitted in printing.)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

David Harrald being first duly sworn on oath deposes and states as follows:

I am 38 years of age and live in Buffalo, Wyoming. I am presently the vice-president and general manager of Reeves, Inc. and have held that position since September of 1977. I am thoroughly familiar with the books, records and history of the company.

Reeves, Inc. is a Wyoming corporation engaged in the production and marketing of ready-mixed concrete in the Wyoming cities of Buffalo, Gillette, and Sheridan and the surrounding area. The company supplies roughly 54% of the ready-mixed concrete in Sheridan, Johnson and Campbell counties, Wyoming. Almost all of the sales of the company are in the state of Wyoming although there are some sales in Montana.

The company was founded by Al Reeves approximately 20 years ago and has been a customer of the South Dakota Cement Plant ever since that time. Up until the calendar year 1978, Reeves, Inc. obtained 95% of its portland cement from the South Dakota Cement Plant at Rapid City, South Dakota. Portland cement is mixed with sand, gravel and water to produce ready-mixed concrete which is sold to the customers of Reeves, Inc. Reeves, Inc. does not make any other product than concrete products. Its

only other receipts are from some incidental sales of related materials. During the 20 year period, sales representatives of the Rapid City Cement Plant have consistently called upon the company and encouraged the company to rely exclusively upon the South Dakota Cement Plant as a source of supply of portland cement.

In July of 1974, Al Reeves sold the stock of the corporation to Al Johnson Construction Company, a corporation having its headquarters and principal place of business in Minneapolis, Minnesota, and since that time, Reeves, Inc. has been operated as a wholly owned subsidiary of Johnson.

After Affiant's appointment to head up the company's operations, he was called upon by John Williams, a sales representative of the South Dakota Cement Plant in affiant's office in Buffalo, Wyoming. The discussion concerned the needs of Reeves, Inc. for portland cement during the remainder of the year 1977. These needs were estimated, orders were placed and shipped in accordance with the long established custom and course of dealing with said establishment. There was a slight interruption of deliveries because of mechanical difficulties at the plant, but never any suggestion of any curtailment of the availability of portland cement from the South Dakota Plant.

From my familiarity with the books, records and personnel of the company, I know that the company has been regularly visited by sales representatives from the South Dakota Cement Plant; that the company has been encouraged to rely exclusively upon the South Dakota Cement Plant for all of its needs for portland cement; and that the company has built its business, invested its capital and

made its plans in reliance upon the expectation of a continuing supply of portland cement from that source. Reeves, Inc. has a capital investment of approximately three million dollars in plant equipment, supplies, facilities, and material sources.

In planning for the year 1978, I determined that it was more feasible to procure portland cement for the Sheridan operation from Ideal Basic Industries of Three Forks, Montana since that plant is geographically competitive and available. In January of 1978, I toured the Rapid City Plant and was fearful that they might have production problems arising out of their construction. I was also aware of a possible regional shortage west of the Mississippi. This shortage has recently spread to the eastern states also.

Accordingly, our plans for 1978 called for procurement of approximately 25% of our portland cement from Ideal and the remaining 75% from the South Dakota Cement Plant.

On July (sic) 30, 1978 I was informed by telephone by our Gillette manager that the South Dakota Cement Plant was refusing to take orders for shipment of cement after the first of July. On June 30, 1978, I also talked with Mr. Holeton at the South Dakota Cement Plant and that message was confirmed.

During the calendar year of 1977, Reeves, Inc. purchased approximately $1,172,000 worth of cement from the South Dakota Cement Plant in Rapid City, South Dakota. Approximately two-thirds of this cement was transported in trucks owned by the plaintiff and delivered to plaintiff's

concrete plants in Sheridan, Buffalo, and Gillette, Wyoming. Approximately one-third of this cement was transported by the South Dakota Cement Plant to the concrete plants owned by Reeves, Inc. in trucks contracted for delivery by the plant.

On July 5, 1978, I dispatched a cement truck owned by Reeves, Inc. to the South Dakota Cement Plant in Rapid City, South Dakota. The driver of the truck has informed me that he requested that the truck be loaded with cement at which time the driver was informed that the truck could not be loaded for the reason that Reeves, Inc. was a business located outside of the State of South Dakota. Subsequently, I talked by telephone with Mike Holeton, sales representative for the South Dakota Cement Plant in Rapid City, South Dakota, and he stated that there would be no out of state shipments of cement from the plant in Rapid City pursuant to the order of the members of the South Dakota Cement Commission. The driver of the truck has informed me that he was told on July 5, 1978, upon being refused the load of cement, that he could not get a load; not today, not tomorrow, and he was not to come back until he or his company was called.

On June 7, 1978, I had a telephone conversation with John Williams, sales representative of South Dakota Cement Commission. I discussed with him, the needs of Reeves, Inc. for cement from the South Dakota Cement Plant in Rapid City, South Dakota for the third quarter of the calendar year of 1978. Mr. Williams indicated that the South Dakota Cement Plant would supply plaintiff with two to three loads of cement per working day through the third quarter of 1978 for delivery to the plant owned

by Reeves, Inc. at Gillette, Wyoming. On June 14, 1978, I met with Mr. Williams in Buffalo, Wyoming at my office. He stated that although there had been a demand for the cement from the South Dakota Cement Plant in excess of production capacity, he was sure that Reeves, Inc. would receive their estimated needs for cement at the plant located in Gillette, Wyoming. Mr. Williams did not indicate in any manner or fashion that furnishing of the cement supply to Reeves, Inc. would terminate on July 1, 1978. At this time I believed that sufficient supply of cement would be forthcoming from the South Dakota Cement Plant based on their representations made to me by Mr. Williams. It was not until the telephone conversation of June 30, 1978 described above, that I became aware that the South Dakota Cement Plant would not supply the necessary needs for the continued operations of the concrete plants owned by Reeves, Inc. and located in Gillette and Buffalo, Wyoming.

If Reeves, Inc. is cut off by the South Dakota Cement Plant during the next six months, the results will be approximately as follows:

(a) We have already laid off 20 out of 60 persons and we will have to lay off another 15. Our sales operations at Buffalo and Gillette are closed down.

(b) Reeves, Inc. has a fixed cost of doing business at a rate of $22,000 per week. Through the supply of cement from Ideal Basic Industries, Reeves, Inc. is presently able to sell, through its concrete plant in Sheridan, Wyoming, approximately 600 cubic yards of concrete per week. The total estimated production capacity for Reeves, Inc., if its supply of three loads per day from the South Dakota

Cement Plant in Rapid City, South Dakota were available, would be 2,500 cubic yards per week. The curtailment of its supply of cement by the South Dakota Cement Commission has resulted in a 76% reduction in production capacity and a 76% reduction in potential sales. If Reeves, Inc. is able to obtain a continued supply of 25% of its needs from Ideal Basic Industries without its needed supply from the South Dakota Cement Plant in Rapid City, South Dakota, Reeves, Inc. will expend and lose in fixed costs the sum of $492,000 during the period of July 1, 1978 to December 31, 1978. In addition, Reeves, Inc. will suffer loss of customer goodwill and confidence through its inability to fulfill its customer's needs.

(c) Because of the seasonal construction period within the market area of Reeves, Inc., the traditional profits made by Reeves, Inc. are made during the months of June through October of each year. In January of 1978, I estimated that the potential profits for Reeves, Inc. during the calendar year of 1978 would be approximately $250,000. Because of the curtailment of its supply of cement from the South Dakota Cement Plant in Rapid City, South Dakota during and after the months of July of 1978, Reeves, Inc. will lose its opportunity to make a profit of $250,000. At the present time, Reeves, Inc. has outstanding commitments to supply concrete for the following projects within its market area:

a. Johnson County School District No. 1 for the construction of an elementary school building located in Buffalo, Wyoming.

b. Johnson County School District No. 1 for the construction of a school addition to Kaycee High School in Kaycee, Wyoming.

c. The city of Gillette for the construction of Gillette Avenue.

d. The State of Wyoming for the construction of Highway 59, north of Gillette, Wyoming.

e. Various commitments to private customers for the construction of homes, streets, sidewalks, commercial buildings, and residences throughout the market area.

Because of the current regional shortage of cement, I have been unable to locate an alternate source of supply of cement for the continued operations of the concrete plants owned by Reeves, Inc. and located in Buffalo and Gillette, Wyoming. Having relied on the representations made by the sales representatives of the South Dakota Cement Plant and made to me in June of 1978 and the historical exclusive dealings by Reeves, Inc. with the South Dakota Cement Plant for its supply of cement, I have been unable to locate a new source of supply by any cement producer west of the Mississippi River. Reeves, Inc., through its representatives and through the representatives of Al Johnson Construction Company, every major cement producer west of the Mississippi has been contacted for delivery of cement to the plants in Buffalo and Gillette, Wyoming and without success. I have been informed by several of the other major producers that because of the current demand for cement during the height of the construction period, that no additional supplies are available. These representatives have located some supplies of cement in states located east of the Mississippi River, but because of transportation problems, particularly the shortage of box cars and current governmental transportation restrictions,

the cement is not available for delivery to Reeves, Inc. in the State of Wyoming.

/s/ David Harrald

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

(Caption omitted in printing.)

AFFIDAVIT

C. A. REEVES, being first duly sworn, upon his oath deposes and states as follows:

1. I am 63 years old and I now reside in Casa Grande, Arizona. I am the former owner and former president of Reeves, Inc., a Wyoming corporation. I began the ready-mix concrete business in Buffalo, Wyoming (then known as Reeves Concrete Products) in 1958 and subsequently incorporated the business as a Wyoming corporation in March of 1965. In July, 1974, my wife, Reta C. Reeves, and I sold all of our interest in Reeves, Inc. to Al Johnson Construction Company, who is the present stockholder of Reeves, Inc.

2. Reeves Concrete Products was started in 1958 when I purchased a small local ready-mix operation located in Buffalo, Wyoming. At the time of purchase the then owner of the ready-mix operation was purchasing ce-

ment from the South Dakota Cement plant in Rapid City, South Dakota. I continued to purchase cement for the operations of Reeves Concrete Products from the South Dakota Cement plant in Rapid City. In the Summer of 1959 I opened a concrete ready-mix operation in Gillette, Wyoming. Ever since the commencement of the ready-mix operations located in Buffalo and Gillette, Wyoming, I purchased all cement for these plants from the South Dakota Cement plant in Rapid City, South Dakota until I sold the business in 1974.

3. In 1966, the company expanded its operations to include a plant at Sheridan, Wyoming. Approximately 50% of the cement needs for the plant located in Sheridan, Wyoming, were purchased from the South Dakota Cement plant in Rapid City, South Dakota.

4. Since its inception in 1958 Reeves has been visited regularly and periodically by sales representatives from the South Dakota Cement plant in Rapid City. At these meetings, with either myself or the plant managers in Gillette and Sheridan, Wyoming, the cement needs of the individual plants were discussed with the sales representative. Upon making estimates of the plant needs for cement, the sales representatives of the South Dakota Cement plant, with one exception in 1971 or 1972 (I cannot recall the exact date) assured me or my representatives that all cement needs for the operations of Reeves, Inc. would be met by the South Dakota Cement plant in Rapid City. The sales representatives never requested that Reeves, Inc. enter into written contracts or place written orders for cement at the time of their visits. The customary method of dealing was to call the cement plant at

Rapid City, South Dakota and place the order or send a truck to the plant for loading. These visits by sales representatives from South Dakota Cement plant were not at the request of either myself or the management of Reeves, Inc., but were made on a regular basis by the plant apparently under their sales policy of encouraging the establishment of customer accounts. From the commencement of the operations in Buffalo in 1958 and the plant in Gillette in December, 1959, to the time of my sale of the business in 1974 all of the cement needs for the operations in Buffalo and Gillette were met and filled by the South Dakota Cement plant in Rapid City.

DATED this 17th day of July, 1978.

/s/ C. A. Reeves

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EXHIBIT NO. 1

Commission Meeting, June 26, 1974 Page 5

The Commission expressed its desire that South Dakota customers and South Dakota contracts be given preference in compliance with the constitution and statutes of this State and that the customers of the Plant be assured that the Plant will make all efforts to fulfill its commitments. President Scanlon announced that the Plant was operating at 98.4% of capacity.

On motion duly made and seconded and carried unanimously, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA
CEMENT COMMISSION

There being no further business to come before the meeting, upon motion duly made, the meeting was adjourned with the Commission's expression to the Honorable Richard F. Kneip, Governor of the State of South Dakota for his attendance and advice.

/s/ Tom Kelley, Chairman /s/ Donald R. Shultz,

Secretary-Treasurer

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EXHIBIT NO. 3

SHIPMENTS (Short Tons)

	70	71	72	73	74	75	76	77
Iowa	523	1547	5047	7950	15172	8065	9976	18600
Minn.	169	16409	19382	43494	70116	45352	39489	33187
Mont.	5583	6903	8608	11837	9370	7328	8190	12591
NE	14635	20095	28583	70322	44831	20341	19819	24258
ND	43018	51290	64164	75776	61192	67063	73704	86625
SD	205844	274810	278187	309165	326666	292338	359131	298746
Wy.	27992	41826	52346	30067	37130	54711	120239	100922
Colo.	2	154	19938	390	-	-	999	3664
Wis.	4	916	-	-	-	-	-	6
Okla.	-	-	-	42	-	-	-	-
Utah	-	-	-	-	-	-	-	24
	297770	413950	476255	549043	564477	495198	631597	578623

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

RESTRAINING ORDER

(Filed July 21, 1978)

Plaintiff made application to this Court for a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction, directing the State Cement Plant to abandon its present policy of selling cement only to residents of the State of South Dakota. The Court having heard the arguments presented by counsel at a hearing held July 19, 1978, and after reviewing the memorandums and cases submitted, as well as the law with respect to injunctive relief; the Court finds:

(1) There is a threat of irreparable harm to the Plaintiff if an injunction is not granted;

(2) The balance of said harm to the Plaintiff outweighs any harm to the Defendants; and

(3) The public interest of the entire region (South Dakota, Nebraska, Wyoming, North Dakota, Minnesota,

Iowa) will be best served by issuance of this Restraining Order.

Both the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution were intended to protect commercial and personal intercourse from invidious restraints, to prevent interference through conflicting hostile state laws or policies. In the matter of interstate commerce we are a single nation—one and the same people. All the states are bound by these clauses and protected by them. A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.

This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege and Immunities Clause.

The Court is aware of the interest and desires of the Defendants to satisfy both the residents of South Dakota and the out-of-state residents. It realizes that the Defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota. The South Dakota Cement Plant, however, cannot refuse to sell cement to

Reeves Construction Company simply because it is not an entity within the boundaries of South Dakota. If a state in this union, were allowed to hoard its commodities or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines.

Because of the fact that the Defendants in this case were given considerable notice of the hearing on the legal issues contained herein and did appear in opposition to the Plaintiff's applications for Temporary Restraining Order, Preliminary and Permanent Injunctions, and because of the further fact that both sides have thoroughly briefed and argued the legal issues involved herein on the merits, and there being no substantial issue of a material fact, it is the ORDER of this Court that under 65a (2) of the Federal Rules of Civil Procedure, the hearing referred to will be a consolidated final hearing with preliminary injunction hearing, upon all legal issues contained in this case. This injunction will be considered as dispositive of all legal issues raised in this case.

The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution. It is therefore

ORDERED that the South Dakota Cement Commission is restrained from using such policy as related to the Plaintiff herein.

Dated this 21st day of July, 1978.

By the Court:
Andrew W. Bogue
United States District Judge

Attest:
William J. Srstka, Clerk

By Betty B. Berry, Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

(Caption omitted in printing.)

AFFIDAVIT IN SUPPORT
OF STAY PENDING APPEAL

Comes now John E. Phelps, Secretary-treasurer of the South Dakota Cement Commission, a department of the State of South Dakota, and a named Defendant in the above-entitled action being first duly sworn on oath, deposes and states that he is authorized to make and does make this Affidavit on behalf of himself and the other Defendants in this action in support of a stay from the order of the Court granting a preliminary and permanent injunction dated July 21, 1978, the facts were obtained by attendance at a public hearing of a special meeting of the Commission at Sioux Falls, South Dakota, on July 24, 1978.

I.

PRELINIMARY STATEMENT

That the Commission, in the adoption of its June 1, 1978, policy (Plaintiff's Exhibit —) of supplying all South Dakota customers first and honoring all contractual commitments and the remaining cement to be allocated on the first-come-first-served basis, was, in good faith, attempting to discharge its duties under the Constitution and statutory mandates of the State of South Dakota, specifically, SDCL 5-17-1, wherein the legislature of the State of South Dakota has declared that the manufacture, distribution and the sale of cement and cement products for public purposes impressed with a public use and as such governmental functions subject to regulation by the State through the Commission as designated in SDCL 5-17-9.

That this Commission policy was a continuation of the policy of the State Cement Commission, commencing as early as 1920 when the Commission, in its report to the Governor, found that

> "That there would be a ready market for the entire output of the State within the State.
>
> That in case there is a surplus, a ready market is available in adjoining states."

This policy was again reviewed and restated by the Commission on June 26, 1974, (Plaintiff's Exhibit).

II.

DEMAND

The demand for cement in the State of South Dakota exceeds the capacity of the plant. The plant shipped during the first six month of 1978, ending June 30, 1978,

267,000 tons. The demand for cement in South Dakota, for the remaining six months in 1978 is in excess of the plant's capacity of 252,000 tons.

III.

AGRICULTURAL SECTOR

That there exists within the State of South Dakota an extreme shortage of grain storage capacity. It is estimated that there is a 5,000% increase in demand for cement from the agricultural sector, primarily caused by a Federal grain storage financing plan enacted in June of 1977.

IV.

PUBLIC SECTOR

It is estimated by the Associated General Contractors that the public use in South Dakota for the last half of 1978, will demand 220,400 tons. It is estimated for the calendar year 1979, there will be a public use demand in South Dakota for approximately 342,000 tons.

V.

STATE TRANSPORTATION DEPARTMENT

Your Affiant has been informed by the State Transportation Department that there are bid lettings, commencing July 1, 1978, for fiscal 1978, requiring 77,678 tons of cement. Additionally, there are deficient county bridges within the State of South Dakota which have become a high priority item. These receive Federal aid funds and are a priority item for the Department of Transportation (see attached letter dated July 25, 1978).

VI.

HEALTH CARE FACILITIES

There are a number of health care projects presently underway in the State of South Dakota, both public and private funding which are considered and authorized by the Department of Health under its certificate of need program to be necessary under the certificate-of-need programs, SDCL 37-A as essential to the health and medical care of the citizens of the State.

VII.

INDIAN RESERVATIONS

That there are presently pending public housing projects within the Indian reservations of the State of South Dakota for public housing programs for the housing and sheltering of the Indian Tribal population, authorized by the U.S. Congress as necessary to the public health and welfare of the Tribal population.

VIII.

CONTRACTUAL COMMITMENTS

That the South Dakota Cement Commission has contractual commitments to contractors within and without the State of approximately 75,000 tons.

IX.

IRREPARABLE INJURY

Your affiant, based upon best available information, is informed and believes and therefore states it to be a fact; that the petitioners in the performance of the Court's order will inflict upon the State of South Dakota and its

citizens an irreparable injury, if they are required to ship cement to nonresidents of South Dakota. The resulting shortage of cement will seriously impair this State's economy, and will result in wide-spread unemployment greatly taxing the State's resources, unemployment compensation fund, and general welfare of the citizens.

X.

PROBABILITY OF SUCCESS ON THE MERITS

Your affiant is informed and believes and represents to the Court that the Commission in good faith intends to prosecute an appeal to the Court of Appeals for the Eighth Circuit relying on the basic premise that the State of South Dakota is the owner of the Cement Plant and can distribute and sell the production of the Cement Plant in such a manner that it deems to be in the best interest of the State to promote the public welfare, prosperity and contentment of its citizens. *Eakin v. South Dakota Cement Commission,* SD, 183 N. W. 651.

The State has the right to choose to whom and on what terms it will sell its products. 72 Am. Jur. 2d states, § 67; *Baldwin v. Montana Fish and Game Commission,* 56 L. Ed. 2d 354 (1978); *McCready v. Virginia,* 94 U. S. 391 (1876); *Geer v. Connecticut,* 161 U. S. 519 (1896); *Hughes v. Alexander Scrap Corporation,* 426 U. S. 794, 49 L. Ed. 2d 220, 96 S. Ct. 2488 (1976); *City of Philadelphia v. State of New Jersey,* Vol. 46 U. S. Law Week, No. 49, 4801, 4804.

Respectfully submitted,

/s/ John E. Phelps
Secretary-Treasurer
South Dakota Cement Commissioners

(Jurat omitted in printing.)

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

Nos. 78-1578, 78-1720 and 78-1721

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1720

Mullinax Concrete Service Company, a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1721

Russell's Ready Mix, Inc., a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

Submitted: October 19, 1978

Filed: November 7, 1978

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

In 1919 the State of South Dakota, as authorized by its constitution, created a cement commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance." S. D. Const. art. XIII, § 10; S. D. Compiled Laws Ann. § 5-17-1,-2,-9. *See generally Eakin v. South Dakota State Cement Comm'n,* 44 S. D. 268, 183 N. W. 651 (1921). In the past the Commission has operated a cement plant and has sold its products to out of state customers as well as to South Dakota residents. In recent months the demand for cement has risen sharply. Therefore, on June 1, 1978, the Commission reaffirmed a policy of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume being allocated on a first come, first served basis. As a result of this policy and the continuing cement shortage, the Commission refused to sell to out of state customers. Reeves, Inc., a Wyoming corporation, challenged this policy in federal district court. The district court, the Honorable Andrew Bogue presiding, found that such policy violated the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3, and enjoined its application to Reeves, Inc. Subsequently, Mullinax Concrete Service Co., a Wyoming corporation, and Russell's Ready Mix, Inc., an Iowa corporation, brought suit seeking a permanent injunction of the policy.[1] The court granted the requested relief in each case and permanently enjoined the Commission from taking any action to prohibit the sale of cement to prospective out of state purchasers because of their nonresidency. The State Cement Commission has filed this appeal. We reverse and remand to the district court with directions to vacate the injunctions.

The federal district court in issuing injunctive relief held:

> The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege [sic] and Immunities Clause of the United States Constitution.

Reeves, Inc. v. Kelley, No. 78-5060, slip op. at 3 (D. S. D. July 21, 1978).

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1 These suits were necessary since following the court's action in *Reeves, Inc. v. Kelley,* No. 78-5060 (D. S. D. July 21, 1978), the Commission adopted a "prioritization" policy, whereby all customers, resident or nonresident, were allowed to purchase an amount equal to 50 per cent of the average amount they had purchased over the last three years. Implementation of that policy or of any other policy requiring out of state sales before the needs of South Dakota customers were met, except as to Reeves, Inc., however, was enjoined by a South Dakota circuit court as violative of the South Dakota Constitution and laws. The Commission obeyed, thus giving rise to *Russell's Ready Mix, Inc. v. Kelley,* No. 78-5073 (D. S. D. Sept. 22, 1978), and *Mullinax Concrete Service Co. v. Kelley,* No. 78-5074 (D. S. D. Sept. 22, 1978). Those cases were consolidated with *Reeves, Inc.* for argument and decision on appeal.

Judge Bogue concluded:

> A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.
>
> This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege [sic] and Immunities Clause.

Id. at 1-2.

The commerce clause[2] has been interpreted as primarily intended to inhibit the power of the states to interfere with the natural functioning of the interstate market through burdensome regulation or prohibition. *See City of Philadelphia v. New Jersey,* 98 S. Ct. 2531, 2535-37 (1978);[3] *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794,

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2 We discuss application of the commerce clause only. The plaintiffs are all corporations, and corporations are not citizens within the meaning of the privileges and immunities clause, U. S. Const. art. IV, § 2, cl. 1. *Asbury Hosp. v. Cass County,* 326 U. S. 207, 210-11 (1945); *Paul v. Virginia,* 75 U. S. (8 Wall.) 168, 177 (1868).

3 In *City of Philadelphia v. New Jersey,* a decision relied upon by the plaintiffs, the Court struck down a New Jersey statute which prohibited importation of solid or liquid waste collected outside of New Jersey. The case stands for the principle that a state may not prevent shipment of privately

(Continued on next page)

806 (1976). In the instant case South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. It has simply acted in a proprietary capacity as a seller of cement within the interstate cement market. Such activity is not the type of state action the commerce clause was intended to restrict.

In *Hughes v. Alexandria Scrap Corp.,* the State of Maryland in an attempt to rid the landscape of junk cars paid a "bounty" to scrap processors for the destruction of inoperable automobiles over eight years old. An out of state processor was required to show title documentation in order to receive the bounty, whereas an in state processor was not. The result was a reduction in the bounties secured by out of state processors from the State of Maryland. A three judge district court concluded that the act constituted an impermissible burden on interstate commerce. The Supreme Court reversed, holding that the State of Maryland did not prohibit or regulate commerce but merely entered the market as a purchaser. In so holding the court said:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and

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(Continued from previous page)

owned articles of trade in interstate commerce on the ground of local need or command. *See also Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911). The Court specifically observed in *City of Philadelphia,* however:

> We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . .

98 S. Ct. at 2537 n. 6.

exercising the right to favor its own citizens over others.

426 U. S. at 810.[4]

The State of South Dakota, in carrying out this proprietary activity possesses the rights of and is subject to the regulatory restrictions on any private business making marketing decisions. *See National League of Cities v. Usery,* 426 U. S. 833, 854 n. 18 (1976); *United States v. California,* 297 U. S. 175 (1936). If a private industry had chosen to market the cement, it would be difficult to argue that the United States Constitution would compel it to sell to nonresidents if it did not so choose. We fail to see that the State of South Dakota must be treated any differently, simply because it is a public body rather than a private industry. The mere fact that it at one time sold cement to out of state entities does not place greater restrictions on its business dealings. South Dakota could have chosen never to make its cement available to out of state customers, and the constitutional question, had it arisen, would not be analytically different from that presented by its recent decision to prefer its residents. *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 809, 817 (Stevens, J., concurring). Nothing in this range of possible marketing decisions affects the initial question whether the commerce clause limits South Dakota's power to choose whether, to whom, and on what conditions to sell its goods. We hold that the commerce clause does not.

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4 The fact that Maryland was a purchaser and South Dakota a seller is not a significant difference between *Hughes* and this case, since regulation of interstate products going either into or out of a state may offend the commerce clause. *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 808 n. 17.

While a state is similar to private business when it participates in the market in a purely proprietary capacity, it is also somewhat different. As a government providing a public service and utilizing the money and resources of its residents, it has a right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the states. *Toomer v. Witsell,* 334 U. S. 385, 409 (1948) (Frankfurter, J., concurring). The factual background in these cases does not indicate that South Dakota has attempted to control channels of interstate commerce. Accordingly, we hold the commerce clause does not prohibit the State of South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 810. *Cf. American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972) (upholding the validity of state printing statutes which required all public printing of the state to be done in the state).

The causes are remanded with directions to the district court to vacate the injunctive relief issued and to dismiss the respective complaints in each case for failure to state a claim for relief.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Session, 1978

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

(Other captions omitted in printing)

Appeals from the United States District Court
for the District of South Dakota.

These causes came on to be heard on the original files of the United States District Court for the District of South Dakota and briefs of the respective parties and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby reversed.

And it is further ordered by this Court that these causes be and are hereby remanded to the said District

Court for proceedings consistent with the opinion of this Court.

November 7, 1978

(Cost information omitted in printing.)'

SUPREME COURT OF THE UNITED STATES

No. 78-1194

Reeves, Inc.,

Petitioner,

vs.

Tom Kelley et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the United States Court of Appeals in this cause is vacated with costs; and that this cause is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. — (1979).

IT IS FURTHER ORDERED that the petitioner, Reeves, Inc., recover from Tom Kelley et al. One Hundred Dollars ($100) for its costs herein expended.

May 14, 1979

(Statement of costs omitted in printing.)

JUDGMENT and OPINION IN QUESTION

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota.

Submitted: June 14, 1979

Filed: August 7, 1979

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

The Supreme Court has remanded our decision, 586 F. 2d 1230 (8th Cir. 1978), for us to reconsider in light of its recent opinion in *Hughes v. Oklahoma,* 99 S. Ct. 1727 (1979). Upon review, we discern significant differences between the cases which cause us to adhere to our earlier holding that the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution, is not violated by the State of South Dakota's policy of preferential sale of cement it manufactures to South Dakota residents.

In *Hughes v. Oklahoma* the Supreme Court overruled *Geer v. Connecticut,* 161 U. S. 519 (1896). The Court rejected the legal fiction that a state owns wild game as a

representative of its citizens and the correlative theory that it could control not only the taking of game, but also its transportation out-of-state even after it was lawfully possessed by another, thereby preventing it from becoming an item of interstate commerce., 99 S. Ct. at 1731-33. Thus, the well established doctrine that a state may not discriminatorily regulate interstate commerce by giving its residents preferred access over out-of-state residents to local natural resources, *see, e. g., City of Philadelphia v. New Jersey,* 437 U. S. 617 (1978); *Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911), now applies as well to wild game.

Our original decision in *Reeves v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978), which upheld South Dakota's preference for in-state residents in its sale of cement, was not based on the rationale that the cement was a state controlled natural resource and therefore South Dakota could regulate or prohibit its trade in interstate commerce. *Reeves v. Kelley* presented the unusual situation in which the challenge was to a state, which as a manufacturer-seller faced with production demands it could not meet, made an administrative decision to give priority to meeting the needs of its residents. As our opinion pointed out, there was no allegation that South Dakota regulated or restricted out-of-state sale of privately manufactured cement or exercised its police powers to suppress competition in the manufacture or sale of cement. We held that South Dakota was acting in a proprietary capacity in the sale of a product it manufactured and that as such it had the right, as any other entrepreneur, to sell to whomever

it chose.[1] The issue remains whether the decision in *Hughes v. Oklahoma* affects our prior holding.

In both *Hughes v. Oklahoma* and *Geer v. Connecticut,* the state restricted out-of-state sale of wildlife reduced to possession and ownership private individuals. In contrast South Dakota has not attempted "to prevent privately owned articles of trade from being shipped and sold in interstate commerce . . . ." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 627 (1978), (quoting *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 10 (1928)). In entering the market and preferring residents in sales, South Dakota has not attempted to regulate commerce; it has not attempted to interfere with or usurp federal regulatory power.[2] While out-of-state purchasers such

1 A state may freely purchase to meet its needs. Although not in the context of a Commerce Clause challenge, the Supreme Court has written:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

Perkins v. Lukens Steel, Co., 310 U. S. 113, 127 (1940).

See also American Yearbook Co. v. Askew, 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972).

2 The issue posed here is the constitutional restriction under the Commerce Clause on state action when Congress has been silent. A state engaging in business is subject to federal power to regulate commerce regardless of whether it acts in a proprietary or sovereign capacity, *see United States v. California,* 297 U. S. 175, 183-87 (1936), and may even be prohibited from selective marketing practices. *See Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 810 n. 19 (1976); *cf. Douglas v. Seacoast Products, Inc.,* 431 U. S. 265 (1977) (federal pre-emption of state fishing regulations). We hesitate to hold the Commerce Clause standing alone requires judicial scrutiny of a state's administrative marketing decisions to insure the least discriminatory alternative is chosen. *See* 80 Harv. L. Rev. 1357 (1967).

as Reeves may feel the effect of a reduced supply of cement in the interstate market, the effect is the result of a major supplier's temporary marketing decision, not unlike the market force exerted by Maryland's purchasing policies in *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976).

South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.,* than conduct at which the prohibitions of the Commerce Clause have historically been directed.[3]

3 We recognize that Justices Brennan, White and Marshall are of the opinion that the type of state action does not influence application of Commerce Clause restrictions, *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 818 (Brennan, J., dissenting). We also recognize that *Hughes v. Alexandria Scrap Corp.* differs from *Reeves v. Kelley* in Maryland's use of market subsidies and its laudatory environmental goal. Nonetheless, *Hughes v. Alexandria Scrap Corp.* is the decision most analogous factually to the instant case, in which the state participates in the market place as a seller, and we therefore deem its analysis controlling. We are confronted with no other decision where the state, acting in a proprietary capacity, is challenged in its marketing decisions under the Commerce Clause alone. We fully recognize that dictum in earlier decisions provides pause for reflection on whether the distinction we make is a proper one. *See Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 511, 522 (1935) (" '[A] state may not, in any form or under any guise, directly burden the prosecution of interstate business.' ") (quoting *International Textbook Co. v. Pigg,* 217 U. S. 91, 112 (1910)); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911). In *West* the Court struck down a protectionist statute saying:

> The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it

(Continued on next page)

We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 810.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Continued from previous page)

> from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retailiated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court.

Id. at 255-56

Yet these and other relevant decisions involve, in one form or another, state regulation of commercial transactions, and

(Continued on next page)

JUDGMENT

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

September Term, 1978

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota.

This Cause came on to be considered on the original files of the United States District Court for the District of South Dakota and briefs of the respective parties without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

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> are not apposite to the situation in which an administrative agency of a state, whose initial entry into the manufacture of cement was not made with a discriminatory motive, makes a self-serving marketing decision. If our distinction is incorrect, we think it better for the Supreme Court to make the pronouncement rather than for this court to furrow new ground.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinions of this Court filed November 7, 1978 and August 7, 1979.

August 7, 1979

(Statement of costs omitted in printing.)